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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MANGUS WILLIAMS,

Plaintiff and Appellant,

v.

FENGHUA NANFANG MACHINO
FACTURE CO.,

Defendant and Respondent.

B291602

(Los Angeles County
Super. Ct. No. BC511469)

APPEAL from an order of the Superior Court of Los Angeles County. Patricia Nieto, Judge. Affirmed.

Law Offices of Safa V. Hodges, Safa V. Hodges for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Mangus Williams appeals the trial court’s denial of his motion for relief from dismissal pursuant to Code of Civil Procedure section 473, subdivision (b), after he failed to appear for a hearing on an order to show cause why his case should not be dismissed for failure to prosecute. We affirm.

BACKGROUND

Williams filed the operative first amended complaint on July 11, 2013, alleging claims for products liability against defendant Fenghua Nanfang Machino Factice Co. (as well as other parties not part of this appeal). Williams did not effectuate service, so on June 3, 2015, the trial court issued an order to show cause why the case should not be dismissed. The trial court called the matter for hearing on March 23, 2016, and Williams failed to appear. The court dismissed the case.

On May 6, 2016, Williams moved to set aside dismissal pursuant to Code of Civil Procedure section 473.¹ His counsel submitted a declaration explaining she failed to appear at the order to show cause (OSC) hearing because her staff had mistakenly failed to enter the matter on her appearance calendar. She also explained after several attempts to serve Fenghua, she learned it was a Chinese company, so she engaged a company to effectuate service in compliance with the Hague Convention. In a follow-up declaration filed on September 22, 2016, Williams’s counsel explained service of process was “still under procedure within the Chinese court system.”

¹ All undesignated statutory citations refer to the Code of Civil Procedure.

The record does not reflect the trial court ruled on this motion, but on January 25, 2017, the court entered a minute order dismissing the case with prejudice for failure to file a proof of service. Williams again moved to set aside dismissal, explaining service was still pending in China. This time, the trial court granted the motion and vacated dismissal as to Fenghua.

The court held a hearing on January 4, 2018, and noted Williams's counsel "represents service is still pending with the [H]ague." The court set another OSC hearing for February 5, 2018. Williams's counsel failed to appear at this OSC hearing, and the court dismissed the case again "for plaintiff's failure to appear and failure to prosecute."

On May 18, 2018, Williams moved yet again to set aside dismissal pursuant to section 473. In the motion, he argued his counsel failed to appear at the OSC hearing again because her staff failed to enter it on her appearance calendar, and he asserted service was still pending. In support of the motion, his counsel submitted a declaration, but this declaration was dated May 2, 2016—more than two years before the pending motion was filed. Except for the signature, it was an exact duplicate of the declaration Williams's counsel submitted in support of his previous motion to set aside dismissal filed two years earlier on May 6, 2016. It even identified the proceeding at issue as the "OSC regarding the Proof of Service for March 23, 2016" and contained an identical typographical error.²

² This declaration and the 2016 declaration both erroneously identified the client as "JUAN PACHECO" in the first paragraph.

No hearing was held on this latest motion to set aside dismissal, but the court issued a minute order on July 9, 2018 adopting its tentative ruling denying the motion (the tentative ruling is not in the record). The court dismissed the action pursuant to section 583.210, subdivision (a), for Williams’ failure to serve Fenghua within three years of commencing the action. Williams appealed.³

³ Williams did not clearly designate the court’s July 9, 2018 minute order in his July 26, 2018 notice of appeal. Instead, he identified an order dated July 19, 2018, but no such order is in the record. We presume that was a typographical error and he intended to appeal the July 9, 2018 order.

Williams also checked the box purporting to appeal from a “judgment of dismissal under Code of Civil Procedure, §§ 581d, 583.250, 583.360, or 583.430.” The July 9, 2018 order denying his section 473 motion *reiterated* his case was dismissed, but the court actually dismissed the case in its February 5, 2018 minute order. Although only one page of that two-page minute order was included in the record on appeal, that page indicates the court clerk mailed the order to Williams on the same day. He had 60 days from that date to file a notice of appeal from that dismissal order; he did not. (Cal. Rules of Court, rule 8.104(a), (e).) That deadline could have been extended if he had filed his section 473 motion *within* this 60-day period. (Cal. Rules of Court, rule 8.108(c); *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 109.) Again, he did not—he filed the motion more than 100 days later. Thus, his notice of appeal was timely only for the order denying his section 473 motion, and we limit our review accordingly. (See *Marriage of Eben-King & King*, at p. 109.)

DISCUSSION

On appeal, Williams argues the trial court erred in denying his motion to set aside dismissal pursuant to section 473, subdivision (b), because his counsel “explained the non-appearance was due to a calendaring error” and “service was not possible except pursuant to Hague Service Convention requirements and the receiving country (China) was responsible for the delay.” We find the first ground sufficient to affirm dismissal so we do not reach the second.⁴

“[U]pon terms as may be just,” a court may relieve a party “from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.” (§ 473, subd. (b).) Relief under this provision can be either mandatory or discretionary. (*Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 399.) Relief is mandatory if the motion is filed in the proper form within six months of the dismissal and “ ‘is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect,’ ” unless the court “ ‘finds that the default or dismissal was not in fact caused by the attorney’s mistake, inadvertence, surprise, or neglect.’ ” (*Ibid.*; see *Hu v. Fang* (2002) 104 Cal.App.4th 61, 64.) Discretionary relief is only available if the attorney’s neglect is excusable. (*Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 26 (*Minick*).)

We review the denial of mandatory relief de novo if it rests on undisputed facts. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.) We review a ruling whether to

⁴ Because we do not address the service of process issues, we deny Williams’ motion to take additional evidence.

grant or deny discretionary relief for abuse of discretion. (*Minick, supra*, 3 Cal.App.5th at p. 24.)

Williams has not specified which type of relief he sought in the trial court, but he has failed to show the trial court erred in denying either type. To obtain mandatory relief, he was required to present an affidavit from his counsel “attesting to his or her mistake, inadvertence, surprise, or neglect.” (§ 473, subd. (b); *Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 438.) While Williams’ counsel submitted a declaration in support of the May 2018 motion, it was plainly insufficient. It was merely a copy of the same declaration dated *two years earlier* (down to the same typographical error), in which counsel explained why she failed to appear at the earlier March 23, 2016 OSC hearing. The OSC hearing leading to the final dismissal was set on January 5, 2018, so the declaration explaining counsel’s error from two years prior could not have “attest[ed] to [counsel’s] mistake, inadvertence, surprise, or neglect” (§ 473, subd. (b)) in failing to appear at the later hearing. For the same reason, the declaration could not show counsel’s mistake or neglect was *excusable*, so Williams was not entitled to discretionary relief.

DISPOSITION

The order of dismissal is affirmed. Fenghua did not file a respondent’s brief, so Williams shall bear his own costs on appeal.

BIGELOW, P. J.

We concur:

STRATTON, J.

WILEY, J.